Supreme Court, U.S.
FILED
AUG 17 2001

No. 01-0115

In The

Supreme Court of the United States

RICHARD L. CHALAL,

Petitioner,

v.

NORTHWEST MEDICAL CENTER, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENT

STEPHEN ASHFORD ROWE
Counsel of Record
LAURENCE J. MCDUFF
LANGE, SIMPSON, ROBINSON
& SOMERVILLE LLP
417 20th Street North, Suite 1700
Birmingham, Alabama 35203-3272
Telephone: (205) 250-5000
Counsel for Respondent
Northwest Medical Center, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the District Court properly entered summary judgment in favor of Respondent based upon the presumption of immunity afforded by the Health Care Quality Improvement Act of 1986 ("HCQIA"), 42 U.S.C. §§ 11101 through 11152.

2. Whether both the Circuit Court and the District Court acted within their discretion in awarding attorney's fees to Respondent based upon HCQIA's fee provision, 42 U.S.C. § 11113.

CORPORATE DISCLOSURE STATEMENT

Respondent Northwest Medical Center, Inc. states that the following is a list of its parent corporations and any publicly held companies that own 10% or more of the corporation:

Parent Corporations

HCA Inc.

Galen Holdco, LLC

HCA Holdco, LLC

HTI Hospital Holdings, Inc.

Healthtrust, Inc. – The Hospital Company

Surgico, LLC

Publicly Held Companies

HCA Inc. is the only publicly held company with ownership interest in Respondent.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 5

I. There is No Lack of Continuity Among the Circuits Concerning HCQIA 5

II. Chalal Presented No Evidence to Rebut HCQIA's Presumption of Immunity 7

III. The District and Circuit Courts Acted Within Their Discretion in Awarding Attorney's Fees 11

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Austin v. McNamara, 979 F.2d 728 (9th Cir. 1992) ...6, 7

Brown v. Presbyterian Healthcare Servs., 101 F.3d 1324 (10th Cir. 1996)..... 7

Bryan v. James E. Holmes Regional Medical Center, 33 F.3d 1318 (11th Cir. 1994).....6, 10, 12

Chalal v. Northwest Med. Center, Inc., 147 F. Supp. 2d 1160 (N.D. Ala. 2000).....2, 8

Imperial v. Suburban Hosp. Ass'n, 37 F.3d 1026 (4th Cir. 1994) 6, 7

Mathews v. Lancaster Gen. Hosp., 87 F.3d 624 (3d Cir. 1996) 6

Smith v. Ricks, 31 F.3d 1478 (9th Cir. 1994) 6, 11

Sugarbaker v. SSM HealthCare, 190 F.3d 905 (8th Cir. 1999) 6

Wayne v. Genesis Med. Center, 140 F.3d 1145 (8th Cir. 1998) 6, 10

STATUTES

Health Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11101 through 11152..... *passim*

BRIEF IN OPPOSITION FOR RESPONDENT

Respondent Northwest Medical Center, Inc. (hereinafter "Hospital") submits that the petition for writ of certiorari filed by Richard Chalal, M.D. ("Chalal") is due to be denied. The decisions below, by the Court of Appeals for the Eleventh Circuit and the United States District Court for the Northern District of Alabama, correctly applied the Health Care Quality Improvement Act of 1986 ("HCQIA"), 42 U.S.C. §§ 11101 through 11152, to find the Hospital immune from monetary liability for terminating Chalal's medical staff privileges after proper peer review proceedings. The courts below also acted properly and within their discretion in finding that Chalal's claims were frivolous, unreasonable, without foundation, or in bad faith, such that both courts awarded the Hospital attorney's fees pursuant to HCQIA's fee provision, 42 U.S.C. § 11113.

STATEMENT OF THE CASE

The Hospital respectfully advises this Court that Chalal's petition contains gross misrepresentations of the record, and completely fails to address the numerous clinical incidents (including two mortalities) which led to Chalal's loss of medical staff privileges at the Hospital. In the peer review proceedings made the basis of this action, two separate physician peer review committees, comprising a total of twelve (12) independent physicians, reviewed these medical incidents from a clinical standpoint and concluded that Chalal lacked sufficient competency to remain on the medical staff. During the entire

peer review hearing process, Chalal made none of the procedural complaints or objections raised in this litigation. Chalal voiced each of these procedural objections only after being disappointed with the outcome of the hearing. In addition, Chalal presented no evidence to the district court to question the substantive findings of medical incompetence made by the physician committees.

An accurate statement of the facts and evidence on record is given in the district court's opinion, *Chalal v. Northwest Med. Center, Inc.*, 147 F. Supp. 2d 1160 (N.D. Ala. 2000), which the Hospital incorporates by reference. The record reflects that the medical incidents at issue were not concocted by the Hospital CEO, as Chalal suggests, but actually occurred throughout Chalal's first year at the Hospital, causing members of the medical staff to question his competency as a physician. On two other occasions prior to the peer review proceedings at issue here, the medical staff had conducted peer review meetings to review incidents in which Chalal's patients suffered poor outcomes. After the second peer review meeting, the medical staff elected to place Chalal on a proctorship, which did not limit his staff privileges but required Chalal to have his hospital admissions reviewed by another member of the medical staff.

As his one-year provisional period came to an end, Chalal applied for permanent staff membership. Pursuant to the procedures outlined in the Medical Staff Bylaws ("Bylaws"), Chalal's application was first reviewed by the medical staff's Executive Committee, made up of seven (7) physicians on active staff. The Executive Committee recommended that Chalal's application be denied, based

on a number of incidents during Chalal's first year which, in the Executive Committee's judgment, reflected poor clinical care and competency.

Chalal requested a hearing, and a separate Hearing Committee was appointed pursuant to the Bylaws, composed of five (5) physicians on active staff who were not members of either the Executive Committee or the Hospital's Board of Trustees. Seven weeks prior to the hearing, Chalal was provided with written notice of the specific incidents giving rise to the Executive Committee's adverse recommendation, and full access to the medical charts involved. This list of medical incidents was not prepared by the hospital's CEO, as Chalal's petition asserts, but rather was prepared by the physicians on the Executive Committee. Among these incidents were two mortality cases, which are not even mentioned in Chalal's petition with this Court.

During the hearing, the five Hearing Committee physicians and Chalal engaged in a thorough case review of each clinical incident at issue. Chalal acknowledged in his deposition that the Hearing Committee allowed him to present as much information or explanation regarding the incidents as he desired. The hearing lasted three hours and a 140-page transcript of the proceedings is included in the record below, which reflects in detail the specific and serious issues of medical competency addressed by the physicians on the hearing committee.

Chalal made no contemporaneous objection to the manner in which the peer review hearing was conducted. Although Chalal now claims he suffered "denial of his

right to counsel" (Pet.'s Br., at 9), this is an utter misrepresentation to this Court. The Bylaws expressly granted the Hearing Committee discretion to allow legal representation during the hearing if requested, but Chalal made no such request. While Chalal was represented by his current attorney, Lindsey Davis, Esq., at least two months prior to the hearing, Chalal never requested to have counsel present at the hearing, nor made any mention of legal representation either before or during the hearing. Accordingly, neither the Hospital nor Chalal was represented by an attorney during the hearing, which was conducted strictly by the physicians on an intra-professional basis. Similarly, Chalal never objected to the composition of the Hearing Committee, raising that objection only after being disappointed with the outcome of the hearing.

The Hearing Committee found as follows: "after careful review of the specific cases and incidents involving Dr. Chalal submitted by the Medical Executive Committee during the Hearing, the Hearing Committee in good faith finds that these specific cases and incidents demonstrate that Dr. Chalal's level of clinical care and competency is unacceptable." Subsequently, the Hospital's Board of Trustees voted to adopt the adverse recommendations of the two medical review committees and to terminate Chalal's hospital privileges. As required by HCQIA, 42 U.S.C. § 11133, the Hospital reported Chalal's loss of staff privileges for inclusion in the National Practitioner Data Bank, an information clearinghouse established by HCQIA "to restrict the ability of incompetent physicians to move from State to State without disclosure or discovery of previous damaging or incompetent performance." 42 U.S.C. § 11101; *see id.*, §§ 11133-34. Chalal

noticed an appeal of the decision in accordance with the Bylaws, and an Appellate Review Committee made up of three (3) additional physicians reviewed the record and affirmed the adverse decision.

Chalal filed this action in state court, alleging violations of HCQIA, federal antitrust law, and several state claims. Following removal and discovery, the Hospital moved for summary judgment, based upon the presumption of immunity afforded by HCQIA to health care entities conducting professional peer review. The district court granted summary judgment in favor of the Hospital, and also granted the Hospital's motion for attorney's fees, pursuant to HCQIA's fee provision, 42 U.S.C. § 11113. Chalal appealed these rulings to the Court of Appeals for the Eleventh Circuit, which not only affirmed the district court's rulings, but also awarded the Hospital attorney's fees on appeal pursuant to 42 U.S.C. § 11113.

REASONS FOR DENYING THE WRIT

I. There is No Lack of Continuity Among the Circuits Concerning HCQIA

Enacted in 1986, HCQIA's avowed purpose is to encourage physician peer review by discouraging the threat of litigation from disciplined physicians. 42 U.S.C. § 11101(4). Contrary to Chalal's assertions in his petition, the circuit courts have consistently and uniformly applied HCQIA's express presumption that a peer review action is taken:

> (1) in the reasonable belief that the action was in the furtherance of quality health care,
>
> (2) after a reasonable effort to obtain the facts of the matter,
>
> (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
>
> (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3). A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 411(a) [42 U.S.C. § 11111(a)] unless the presumption is rebutted by a preponderance of the evidence.

42 U.S.C. § 11112(a). *See, e.g., Sugarbaker v. SSM Health-Care,* 190 F.3d 905 (8th Cir. 1999); *Wayne v. Genesis Med. Center,* 140 F.3d 1145 (8th Cir. 1998); *Mathews v. Lancaster Gen. Hosp.,* 87 F.3d 624 (3d Cir. 1996); *Bryan v. James E. Holmes Regional Medical Center,* 33 F.3d 1318 (11th Cir. 1994); *Smith v. Ricks,* 31 F.3d 1478 (9th Cir. 1994); *Imperial v. Suburban Hosp. Ass'n,* 37 F.3d 1026 (4th Cir. 1994); *Austin v. McNamara,* 979 F.2d 728 (9th Cir. 1992).

In each of the foregoing decisions, the circuit courts uniformly hold that summary judgment is proper, based on the immunity afforded by HCQIA, unless the physician affirmatively meets the burden of rebutting the statute's presumption that the peer review action was taken in conformance with §§ 11112(a)(1)-(4) above. *Sugarbaker,* 190 F.3d at 911-912; *Wayne,* 140 F.3d at 1148; *Mathews,* 87 F.3d at 632-33, 635; *Bryan,* 33 F.3d at 1333, 1335; *Smith,* 31

F.3d at 1485; *Imperial*, 37 F.3d at 1030; *Austin*, 979 F.2d at 733-34. In addition, each of the foregoing circuit court decisions holds that for purposes of HCQIA immunity, the reasonableness of the peer review action is based on an *objective* standard, not subjective. *Id.* While there are certainly decisions which have applied these parameters to the evidence and found that HCQIA's presumption of immunity has been successfully rebutted, *see, e.g., Brown v. Presbyterian Healthcare Servs.*, 101 F.3d 1324 (10th Cir. 1996), the decisions all confirm that it is the physician's burden to overcome the presumption with objective evidence that the peer review decision was unreasonable or procedurally unfair. Chalal submitted no such evidence in this case.

Accordingly, Chalal's claim that "there is a lack of continuity among the circuits . . . as to application of HCQIA," (Pet.'s Brf., at 7), is simply without foundation. The district and circuit courts below followed the same summary judgment standard for HCQIA immunity as has been consistently set forth in numerous prior circuit court decisions. Chalal's petition conspicuously does not cite to any circuit court decision which employs a different standard.

II. Chalal Presented No Evidence to Rebut HCQIA's Presumption of Immunity

Chalal's petition should also be denied because he offered absolutely no evidence before the district court to question either the objective reasonableness of the Hearing Committee's medical findings, or the fairness of the proceedings. The district court correctly summarized:

> Dr. Chalal has failed to present any evidence which would even suggest that the Hospital's decision to terminate his staff privileges was not reasonable and in full compliance with the due process and fairness requirements set forth in 42 U.S.C.A. § 11112(a). To the contrary, the record overwhelmingly reflects that the Hospital's decision was reasonable, based on a legitimate concern for patients, supported by facts and medical evidence, and reached only after proper notice and hearing procedures were afforded to Dr. Chalal.

Chalal v. Northwest Med. Center, 2000 WL 33357036, at p. 5.

As noted above, although Chalal's petition baldly claims that he suffered numerous "due process violations," (Pet.'s Brf., at 6), the record on appeal supports no other conclusion but that the Hospital's peer review fully complied with HCQIA's due process and fairness requirements. Chalal says he was denied the right to counsel, but he failed to employ the Bylaws' express provision giving the Hearing Committee discretion to allow representation during the hearing. (Chalal fails to mention this Bylaws provision in his petition to this Court). Chalal says the Hearing Committee members were biased, but he never objected to the composition of the committee either before or during the hearing. Moreover, the test under HCQIA for the reasonableness of the peer review decision is an objective one – Chalal offered not a shred of evidence to rebut the Hearing Committee's substantive conclusion based on the particular medical cases reviewed that Chalal lacked sufficient competence as a physician.

The list of record distortions in Chalal's petition goes on and on. Chalal says the medical incidents were "bootstrapped" or somehow concocted by the Hospital CEO, and that he did not receive advance notice of them, but the record below shows that the list of medical incidents was prepared by physicians on the Executive Committee, and that Chalal was notified of the specific incidents in writing a full seven weeks prior to the hearing. Chalal admitted in his deposition that he had been given full access to the actual patient charts involved in order to prepare for the hearing, another fact omitted from his petition. The peer review proceedings were initially prompted by Chalal's application for permanent staff privileges, and there is no dispute that the specific medical instances identified by the Executive Committee physicians actually occurred. Chalal offered nothing to counter the medical judgment of the physician committees as to these substantive cases, which were not "nebulous" but included two mortalities and numerous other serious instances of incompetence.

Chalal says that the Hospital refused to send a letter of reference to other hospitals unless he signed a release of liability, but he neglects to mention that the proposed release was expressly limited to liability in connection with sending the letter. The Hospital was willing to send the letter only after obtaining Chalal's approval, because the letter of reference necessarily stated that Chalal had lost his staff privileges due to competency issues. Indeed, Chalal admitted he did not like the contents of the letter proposed by the Hospital and did not want it sent to other hospitals.

Another distortion of the record relates to alleged defamatory comments by hospital employees, which Chalal belatedly offered before the district court in the form of affidavits. Chalal's petition fails to discuss that the district court struck the affidavits because Chalal submitted them after the court's discovery deadlines had expired; the district court further found that the affidavits did not lay an evidentiary foundation sufficient to bind the Hospital.

Chalal's petition also mischaracterizes the notice and hearing guidelines in HCQIA, 42 U.S.C. § 11112(b), which are not absolute requirements as a matter of right, as Chalal suggests, but rather are "safe harbor" guidelines. HCQIA expressly states that "[a] professional review body's failure to meet the conditions described in this subsection shall not, in itself, constitute a failure to meet the standards of subsection (a)(3)." 42 U.S.C. § 11112(b). If other procedures are followed, but are not precisely of the character spelled out in § 11112(b), the test of adequate notice and hearing procedures may still be met under the circumstances. *See, e.g., Bryan*, 33 F.3d at 1336. In the present case, the district court expressly found that the Hospital's notice and hearing procedures both complied with HCQIA's safe harbor provision in § 11112(b), and in addition were "fair to the physician under the circumstances." 42 U.S.C. § 11112(a)(3). Chalal's misstatement in this regard is similar to his urging that HCQIA creates a private right of action, which it most clearly does not. *See, e.g., Wayne*, 140 F.3d at 1148.

Without addressing in more detail the alleged "due process" violations claimed by Chalal, it is sufficient to

say that the record on appeal supports none of these allegations. Nor is there any evidence on record challenging the reviewing physicians' substantive findings of incompetence.

III. The District and Circuit Courts Acted Within Their Discretion in Awarding Attorney's Fees

HCQIA's statutory purpose is to encourage peer review actions by discouraging physicians from bringing unsubstantiated legal claims. To further this purpose, Congress included an attorney's fee provision in HCQIA, which provides as follows:

> In any suit brought against a defendant, to the extent that a defendant has met the standards [for HCQIA immunity] and the defendant substantially prevails, the court shall, at the conclusion of the action, award to a substantially prevailing party defending against any such claim the cost of the suit attributable to such claim, including a reasonable attorney's fee, if the claim, or the claimant's conduct during the litigation of the claim, was frivolous, unreasonable, without foundation, or in bad faith.

42 U.S.C. § 11113.

The standard of review for an award of attorney's fees under HCQIA is for abuse of discretion. *See, e.g., Smith v. Ricks*, 31 F.3d 1478, 1487 (9th Cir. 1994). In the instant case, neither the district court nor the circuit court abused its discretion in concluding that Chalal's lawsuit was frivolous, unreasonable, without foundation, or in bad faith, such that attorney's fees should be awarded pursuant to HCQIA.

The district court expressly found that Chalal never had any substantive basis upon which to challenge the medical staff's termination of his hospital privileges, but filed this litigation simply as an economic threat. The circuit court similarly held, "Our conclusion in *Bryan* appears equally compelling in this case: 'This is precisely the type of case that Congress targeted when passing [the Act]. . . . ' " (Circuit Court op., at 4) (quoting *Bryan v. James E. Holmes Regional Medical Center*, 33 F.3d 1318, 1337 (11th Cir. 1994)). Accordingly, Chalal's assertion that the two courts below abused their discretion in awarding attorney's fees is without merit. Given the complete lack of evidence offered by Chalal to challenge the Hospital's HCQIA immunity, the courts acted properly in finding Chalal fully subject to HCQIA's attorney's fee provision.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

STEPHEN ASHFORD ROWE
Counsel of Record
LAURENCE J. MCDUFF
LANGE, SIMPSON, ROBINSON
& SOMERVILLE LLP
417 20th Street North, Suite 1700
Birmingham, Alabama 35203
Telephone No.: (205) 250-5000
Counsel for Respondent
Northwest Medical Center, Inc.